

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.513 OF 2015

IN

CRIMINAL APPEAL NO.803 OF 2014

TSERING TOBGES @ JILEBI BHAI)...APPLICANT

V/s.

UNION OF INDIA AND ANR.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.512 OF 2015

IN

CRIMINAL APPEAL NO.804 OF 2014

TAMDIN SICHOE @ CHOTUBHAI)...APPLICANT

V/s.

UNION OF INDIA AND ANR.)...RESPONDENTS

Mr.Ayaz Khan a/w. Mr.Dilip Mishra, Advocate for the Applicants.

Mr.D.A.Nalawade, Advocate for Respondent No.1 - Union of India.

Mrs.M.R.Tidke, APP for Respondent No.2 - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 28th AUGUST 2015.

ORAL ORDER :

1 These two applications can be conveniently disposed of by this common order as the applicants were prosecuted and convicted in a single case namely Special (NDPS) Case No.14 of 2011 tried by the Special Judge at Nasik. The applicants were convicted of offences punishable under Section 20(b) read with Section 20(ii)(c) of the Narcotics Drugs and Psychotropic Substances (NDPS Act) and Section 29 read with Section 20(ii)(c) of NDPS Act, and sentenced to suffer Rigorous Imprisonment for 15 years each, and to pay a fine of Rs.2 Lac each, on each of the said two counts. The applicants have filed separate appeals before me, which have been admitted, and are pending. By the present applications, the applicants pray that, pending the hearing and final disposal of the appeals filed by them, the substantive sentences imposed upon them by the learned Special Judge be suspended and they be released on bail.

2 I have heard Mr.Ayaz Khan, the learned counsel for the applicants. I have heard Mr.D.A.Nalawade, the learned Public Prosecutor for the Union of India. With their assistance, I have glanced through the evidence, adduced during the trial. I have also been taken through the relevant parts of the impugned judgment.

3 In brief, the prosecution case, as put forth before the trial court, may be stated thus :

On 13th February 2011, Kishor Hate (PW3), Intelligence Officer, Narcotic Control Bureau (NCB), at about 2.30 a.m., received secret information that 'substantial quantity (around 100 kgs) of *Hashish* had been stored by two persons by name Tsering Tobges @ Jilebibhai, aged around 45 years (applicant in Criminal Application No.513 of 2015 in Criminal Appeal No.803 of 2014) and Tamdin Sichoe @ Chotubhai, aged around 44 years (applicant in Criminal Application No.512 of 2015 in Criminal Appeal No.804 of 2014), both looking like

Tibetans, in their residence situated at Room No.92, Tibetan Market, Sharanpur Road, Nasik.' This information was typed down and the same was forwarded to his superior Mr.Claudius Fernandes, Superintendent, (PW5). Mr.Fernandes then made an endorsement on the information report and directed Prakash Antony, Intelligence Officer (PW1) to visit the said premises along with searching kit, seal and take search of the premises. Accordingly, a team of the officers proceeded from Mumbai to Nasik and reached there at about 10.00 p.m. Two persons from the locality were taken as panchas to witness the search and seizure. When the said room was searched, the applicants were found in the said room along with huge quantity of *charas* kept in 33 packets, each packet weighing 2 kgs was found.

4 Mr.Ayaz Khan raised a number of contentions. According to him, in the first place, there had been no satisfactory compliance with the provisions of Section 42 of the NDPS Act. He submitted that it was incumbent upon the officers of NCB to have recorded the received information in a register, but in this case,

admittedly, it was simply typed on a loose paper. He also pointed out that the evidence of the witnesses did indicate the existence of a register mentioned as 'Intelligence Register,' but the entry in respect of the said information was still not made in the register, on the ground that such entry would be made only when the informers would claim a reward. According to Mr.Khan, in view of the observations made by the Supreme Court of India in **Karnail Singh vs. State of Haryana reported in (2009) 3 Supreme Court Cases (Cri) 887**, this would not be construed as sufficient and proper compliance with the provisions of Section 42 of the NDPS Act. He submitted that non-compliance with the provisions of Section 42 has been held fatal to the prosecution, in a number of pronouncements of the Supreme court of India. Mr.Khan also contended that a reading of sub-section (2) of Section 41 indicates that the authorization to search could be issued by a Gazetted Officer, only if the information is received by him in person. He submitted that this is borne out from the language used in sub-section (2) of Section 41.

5 Mr.Khan also submitted that the evidence of the panch witness Mandar Karmarkar (PW2) did not support the prosecution case. He contended that the panch initially spoke about only one person being present in the said Room No.92, and it is only after an adjournment that was obtained by the learned APP, supposedly, only for showing the contraband property to the witness, that the panch abruptly spoke about there being two persons in the room. Mr.Khan also submitted that as per the prosecution case, 33 packets of *charas* had been kept in *four bags*, but the panch witness mentions only about *two bags*.

6 Mr.Khan also contended that the story of the prosecution was not believable in as much as the room in question was supposed to be measuring about 80 sq.feet with certain furnitures and articles, and that, the room would be too small to accommodate a large number of persons i.e. the officers, panchas, the applicants, etc., in it at a time and to draw panchnama in the said room, as per the prosecution case.

7 The most important contention raised by Mr.Khan is that, there was no satisfactory evidence that the applicants were, or any of them, was, in possession of Room No.92. He submitted that it was an admitted position that this room was in the colony of the Tibetan Association. It appears that this colony has been constructed by the Municipal Corporation of Nasik and has been given to the Tibetan Association for occupation by their members. He submitted that the evidence showed that the electricity bill in respect of the said Room No.92 was in the name of one Dhoundup Tsering and that the Municipal tax for the same was also paid by the said Dhoundup Tsering. The prosecution had relied upon some oral evidence of Wangdu Chopthel (PW6), who is the secretary of the Tibetan Association, to show that at the material time, Room No.92 had been allotted to the father of the applicant Tamdin (applicant in Criminal Application No.512 of 2015 in Criminal Appeal No.804 of 2014), but it is contended by Mr.Khan that, in the circumstances, the investigating agency ought to have recorded the statement of the said Dhoundup. He submitted that no enquiries in that regard were made.

8 Since the emphasis of the prosecution was on the applicants *being found in the room at the time of raid*, which would get support from the nature of the information received, which allegedly disclosed their names, the reliability of the said piece of evidence would need examination. According to Mr.Khan, the authenticity of the record showing the information received, was open to doubt. In this context, the attention of this court was drawn to the fact that authorization to search issued under sub-section (2) of Section 41 of the NDPS Act (Exhibit 20) was signed by the panch witness on 14th February 2011, i.e., *after* the search was carried out. It was submitted that the Officer, who issued the authorization, was present at Nasik on 14th February 2011, and therefore, the possibility of the authorization having been prepared subsequently could not be ruled out.

9 In addition to the evidence of the Officers from the raiding party and the panch, reliance was also placed on the statements of the applicants, that came to be recorded in the course of investigation, purportedly under the provisions of

Section 67 of the NDPS Act. These statements are of an incriminating nature. That, the statements recorded under the said provision could be received in evidence subject to the provisions of Section 24 of the Evidence Act, has not been disputed. However, admittedly, the applicants did not understand English, and perhaps were not fluent in Hindi also. Their statements came to be recorded in a rather unusual manner. They were recorded by Wangdu (PW6). While there would be no objection for the investigating agency taking help from an interpreter for recording of statements, Mr.Khan contended that neither the evidence of Wangdu (PW6) nor the evidence of Sudhakar Mehta (PW4), who claims to have recorded the statements, shows in what manner they were recorded. I have gone through the relevant evidence. The statements have not been recorded in question and answer form. Wangdu (PW6) claims to have recorded the statements *himself as per the narration given by the applicants*, and does not state that he put the queries as per the instructions of Sudhakar Mehta (PW4) to the applicants, and that, he translated the replies given by the

applicants, to PW4 Sudhakar Mehta. According to Mr.Khan, these statements cannot be construed as having been recorded under the provisions of Section 67 of the NDPS Act. There is some substance in this.

10 Mr.Nalawade, the learned Public Prosecutor for NCB, submitted that there was some evidence indicating that the room in question had been allotted, at the material time, to the father of the applicant Tamdin (applicant in Criminal Application No.512 of 2015 in Criminal Appeal No.804 of 2014). He also submitted that the seizure panchnama indicated that some documents belonging to the applicants were recovered from Room No.92. According to him, this would, therefore, indicate that the applicants were in possession of the said Room No.92, at the material time. Mr.Khan, in reply, submitted that when the authenticity of the record as to the receipt of information and the authorization of search was doubtful, the possibility of these documents having been procured from elsewhere, and shown as having been recovered from Room No.92, needed serious consideration. There is substance in this

contention, particularly because, there was evidence to show connection of Tamdin (applicant in Criminal Application No.512 of 2015 in Criminal Appeal No.804 of 2014) with Shop nos.26 and 27, where at the material time, he was carrying out certain repairing work.

11 Mr.Nalawade also drew my attention to a document tendered before the court during the trial, which was marked as Exhibit 75. This document purports to be a declaration made by the applicant Tamdin (applicant in Criminal Application No.512 of 2015) and according to Mr.Nalawade, this would again establish that the applicant Tamdin admitted to be the owner of the said Room No.92. I have gone through the evidence of Wangdu (PW6) through whom the said document was produced before the court. While producing this document before the court, this witness has merely stated that 'he was called to Mumbai in the office of NCB, and there he translated document in Tibetan language into English language.' The document at Exhibit 75 purports to be the translation of the document at Exhibit 74, which is in Tibetan

language. The testimony of this witness does not throw any light as to from where the document came to be procured by the prosecution. In any case, Mr.Khan has pointed out the admission given by this witness to the effect that the Municipal tax of Shop No.92 was paid by one Dhoundup, and that, *there was no record with the Association to show that the applicants, or any of them, were occupying Room No.92 at the material time.*

12 I have carefully considered the matter. A thorough and meticulous examination of the evidence, as would be required to be done at the time of final hearing of the appeal, cannot be done for the purposes of the present applications. What needs to be observed is that, undoubtedly certain arguable points needing serious consideration have been raised. There are no ready or easy answers thereto, and the same would need determination at the time of final hearing of the appeals.

13 The appeals are not likely to be taken up for final hearing within a short time. The applicants are in custody for a

period of more than 4½ years. A consideration of the evidence adduced during the trial shows the existence of reasonable grounds for believing that the applicants are not guilty of the offences in question.

14 In the circumstances, I am inclined to allow the applications, subject to certain conditions.

OPERATIVE ORDER IN CRIMINAL APPLICATION NO.513 OF 2015

1. The application is allowed.
2. Pending the hearing and final disposal of the appeal, the substantive sentences imposed upon the applicant shall stand suspended; and the applicant shall be released on bail in the sum of Rs.2 Lac with one surety in the like amount, or two sureties in the sum of Rs.1 Lac each, on the condition to report to the trial court on the first Monday of every calendar month, till the disposal of the present appeal.

Should the trial court be closed on any given Monday on account of a holiday, the applicant shall report to the trial court on the next working day.

3. The applicant shall not leave the local limits of the State of Maharashtra without the express permission of this court.
4. The applicant shall intimate to the investigating agency i.e. NCB, in writing, his address where he would be staying after his release, and during the pendency of the appeal, within a period of two weeks after his actual release; and shall not change this address without giving advance intimation in writing to NCB.
5. The application is disposed of in the aforesaid terms.
6. The hearing of the appeal is directed to be expedited.

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(ABHAY M. THIPSAY, J.)